[redacted]

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 309(j) of the Communications Act - Competitive Bidding	)	PP Docket No. 93-253
	)	
Amendment of the Commission's Cellular PCS Cross-Ownership Rule	)	GN Docket No. 90-314
	)	
Implementation of Sections 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Services	)	GN Docket No. 93-252

COMMENTS OF THE SOVEREIGN NATION OF THE ONEIDA TRIBE OF INDIANS OF WISCONSIN

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Dated: July 7, 1995

SUMMARY

In its comments, the Sovereign Nation of the Oneida Tribe of Indians of Wisconsin ("Oneida Tribe"), supports the Commission's efforts to promptly restructure its procedures to comply with the imperatives of the Supreme Court's decision in Adarand Constructors, Inc. v. Pena, 63 U.S.L.W. 4523 (U.S. June 12, 1995). At the same time, the Oneida Tribe supports the Commission's efforts to accomplish that restructuring in a manner that continues its commitment to ensure that small business enterprises are able to participate in the "wireless revolution" in the communications industry.

Relevant to the latter position, the Oneida Tribe's comments support the Commission's determination that Indian tribes possess a unique status by virtue of long standing Congressional enactments and the "Indian Commerce Clause" of the United States Constitution. Attachment A to these comments provides a pertinent legal discussion on this issue and is a restatement of informal comments submitted by the Oneida Tribe on June 16, 1995 in response to the announcement by the Supreme Court of the Adarand decision.

Of greater concern to the Oneida Tribe however is the Commission's prior rulings regarding the effect of "gaming revenues" on the eligibility of the Oneida Tribe to participate in the entrepreneurs' block C PCS auction. The comments demonstrate that the current position on the effect gaming revenues have in determining the application of the affiliation rules, is one whose adoption is procedurally infirm, and its underlying rationale legally erroneous, constitutionally suspect, and contradictory to the Commission's announced intentions to foster participation of small disadvantaged businesses, and particularly Indian tribes, because of their unique status and their unfortunate long-standing economic disadvantages.

The Oneida Tribe's comments will show that --

The basis for penalizing gaming revenues finds no substantive support in the record before the Commission. To the contrary, there is record support for the opposite proposition in the Commission's Order on Reconsideration, FCC 94-217 (released Aug. 15, 1994, 75 RR 2d 1208;

The exclusion is based on a mistake of law and is inconsistent with the law on how federal agencies must proceed when they choose to apply the criteria and standards of the Small Business Administration ("SBA");

The exclusion of gaming revenues defies economic rationale or analysis, particularly given the presence of much larger A and B block competitors who will have a headstart in the marketplace despite the best efforts of the Commission to minimize that advantage or to compensate for it by the presumed lowering of bidding values for block C market areas;

The application of such an exclusion of revenues is discriminatory vis-a-vis numerous other entities - small business consortia, other Indian tribes with equal or greater sources of revenues derived from non-gaming sources, cash-rich minority/female enterprises, funded independently or via large non-attributable investors, and A and B licensees which are able to fund their PCS operations with the profits they derive, and have derived, from monopoly or near monopoly-based services; and

The exclusion, even with the rebuttal presumption, clearly contradicts the expressed purposes of the Commission's administration of its auctions rules, introduces the demon of delay to the prompt roll-out of competitive PCS service to the public and will unfairly penalize and disadvantage a unique segment of Americans, whose unfortunate and unwarranted economic circumstances constitute one of the most intractable economic problems for a people in this country. Unless the exclusion is erased, the Oneida Tribe, and potentially other Indian tribes, will be denied their rights to full and fair participation in the block C auction, contrary to the expressed will of Congress and the announced commitments of the Commission itself.

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COMMENTS OF
THE SOVEREIGN NATION OF THE
ONEIDA TRIBE OF INDIANS OF WISCONSIN

The Sovereign Nation of the Oneida Tribe of Indians of Wisconsin ("Oneida Tribe"), by its attorneys, submits its comments on the Further Notice of Proposed Rule Making, adopted and released June 23, 1995, in the captioned proceedings ("FNPRM").

BACKGROUND

1. In its FNPRM, the Commission has "proposed measures to address legal uncertainties raised by the Supreme Court's ... decision in Adarand Constructors, Inc. v. Pena ... (FNPRM ¶ 1). The Commission also reasserted its commitment "to ensure that ... designated entities are afforded opportunities to participate in the provision of spectrum-based services." (Id.)

2. The FNPRM sets forth proposals to eliminate all race- and gender-based provisions in the competitive bidding rules "in order to avoid delay caused by legal challenges to our existing rules that likely would result from the Supreme Court's ruling in Adarand." (Id. @ ¶ 2). Further, "in light of the stay granted Telephone Electronics Corp. (TEC)," the Commission proposes to eliminate any differences in the status of women and minorities as aspiring PCS licensees. (Id.)

3. On June 27, 1995, Commission Chairman, Reed E. Hundt, in a speech to the American Mobile Telecommunications Association Leadership Conference, personally reaffirmed the Commission's stewardship of its obligation to fairly allocate the Nation's radio resources -

> The FCC manages the public property of the airwaves to promote the public interest. This means, among other things, that **we make sure that new businesses and small businesses have a chance to gain access to spectrum. Without us, the big established companies would be in total control of the communications revolution.... This is why we intend to foster an industry structure that allows large and small providers the flexibility to offer the services their customers need.** (Emphasis added.)[1]

4. Chairman Hundt also emphasized that the Commission wanted the marketplace to determine how these businesses developed and what services were provided, not FCC regulation. He concluded his remarks by citing the FCC's role in setting rules of fair competition to ensure an "even playing field for all participants in the wireless communications revolution."

5. A further purpose of the FNPRM was enunciated. The Commission seeks to make "changes swiftly, in order to minimize the effect of the modified rules on existing business

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[1] FCC NEWS, June 27, 1995, Mimeo page 1001. While Chairman Hundt's speech was primarily directed to issues facing SMR licensees, it was clear that his remarks concerning the Commission's commitment to small business participation were meant to encompass all forms of wireless technology, including therefore, PCS.

relationships formed in anticipation of the C block auction" (Id.), citing the "numerous letters" the Commission received "urging it to go forward with the C block auction as expeditiously as possible." (Id @ n. 8).[2]

6. In addressing concerns over further delay in instituting the block C auctions, already once delayed, the Commission concluded -

> [A] delay would put the C block winners at a greater competitive disadvantage vis-a-vis existing wireless carriers such as cellular and enhanced SMR carriers, who have a substantial head start in the market. (Id @ ¶ 8).

7. Similar recognition was given to the potential adverse consequences of delay, from the filing of petitions to deny, based on legal challenges to the awarding of benefits on the basis of the minority and female status of C block applicants -

> [T]here is a high likelihood that minority applicants and possibly female applicants who elected the bidding credits and other provisions available to members of those groups, would be subject to petitions to deny their licenses, legal challenges and possible injunctions on the issuance of their licenses. **This would again greatly delay their entry into the market, and diminish their ability to compete.** (Id. Emphasis added.)

8. The solution the Commission has proposed, to eradicate these potentials for delay, is to base its auction rules for C block licenses on "economic size only." (Id @ ¶ 9). The Commission's recognition of the time factor on the competitive positions of aspiring PCS licensees and on the formation and maintenance of the delicate business relationships necessary to the realization of those aspirations, is most laudable and unique, constituting a specific example of "reinventing government" in a positive and concrete manner.

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[2] On the same date the FCC issued the FNPRM, it issued a Public Notice announcing July 28, 1995 as the new date for submitting the short form applications (FCC Form 175), with upfront payments due August 15, 1995 and the commencement of the C block auction on August 29, 1995. (DA 95-1420, June 23, 1995).

9. The Commission has further recognized the importance in avoiding delays to the implementation of PCS licenses won in the earlier blocks A and B auctions. In a Memorandum Opinion and Order in In the Matter of Deferral of Licensing of MTA Commercial Broadband PCS, PP Docket No. 93-253 and ET Docket No. 92-100, DA 95-1410, released June 23, 1995 (herein the "Deferral Order"), the Chief of the Wireless Telecommunications Bureau ("Bureau") denied review of its earlier order denying a motion to delay issuance of the 99 A and B block licenses for broadband PCS and denied a request for stay of the grants of these licenses.

10. In its Deferral Order, the Bureau rejected claims that proceeding with the prompt and timely grant of the block A and B licenses would provide the large entities receiving the licenses with an "insurmountable headstart" in the marketplace, and skew the competitive balance against block C licensees, and thereby undercut the FCC's obligation to ensure participation by designated entities in the PCS arena and allow the large entity block A and B licensees to unlawfully allocate markets.

11. In rejecting these efforts to delay grant of the block A and B licenses, among other factors, the Bureau weighed the harm to the A and B block licensees who "have invested significant funds in start-up costs which cannot begin to be recouped until licenses are issued." (Deferral Order @ ¶ 31). It also ruled that a stay in issuing the licenses would "delay the introduction of new competition and new services to the public," contrary to the "Congressional directive to promote the development and rapid deployment of PCS for the benefit of the public with a minimum of administrative or judicial delay." (Id. @ ¶ 32).

12. In a concurrent Order in In the Matter of Applications for A and b Block Broadband PCS Licenses, DA 95-1411, released June 23, 1995 (herein the "A/B Order"), the

Bureau denied similar requests to deny the applications of all winners of the auction of the 99 A and B block PCS licenses or stay their licensing until the FCC was in a position to license the eventual winners of the block C PCS licenses. Would-be A and B block competitive licensees fared no better in their challenges to the grants of PCS licenses to established large carriers. See Order in In the Matter of Application of Wireless Co., L.P. for a License to Provide Broadband PCS Service on Block A in the San Francisco Major Trading Area (M004), et al, DA 95-1412, released June 23, 1995; Order in In the Matter of Application of Pacific Telesis Mobile Services for a License to Provide Broadband PCS Service on Block B in the Los Angeles-San Diego Major Trading Area (M002), DA 95-1413, released June 23, 1995; Order in In the Matter of Application of Pacific Telesis Mobile Services for a License to Provide Broadband PCS Service on Block B in the San Francisco-Oakland-San Jose Major Trading Area (M005), DA 95-1414, released June 23, 1995.

13. The foregoing review demonstrates that a clear and unchallengeable record exists on two very important points. First, the Commission is obligated and intends to accomplish Congress' and its own goals for the effective participation of economically smaller and lesser advantaged entities in the "wireless revolution." Second, the Commission has a clear and unequivocal recognition of the harm that delays in licensing can and would cause and has established that it is bound by substantive public interests not to permit procedural sources of delay or frivolous, self-serving attempts at delay to interfere with and frustrate the Commission's duty to process and grant block C PCS applications expeditiously and fairly, making every effort to eliminate, to the maximum extent possible, any further delays from whatever source.

AFFILIATION RULE CHANGES AND INDIAN TRIBES

14. The Commission's affiliation rules are designed to identify entities whose gross revenues and assets must be aggregated with those of the applicant in determining whether the applicant exceeds the financial caps for the entrepreneurs' blocks or for small business size status. Of critical importance to the Oneida Tribe is the exception to these rules for applicants affiliated with Indian tribes. Correctly and irrefutably, in reviewing its affiliation rules in light of the Adarand decision, the Commission concluded that -

> [T]he "Indian Commerce Clause" of the United States Constitution provides an independent basis for this exception that is not questioned by the Adarand decision.61
>
> 61 Order on Reconsideration, FCC 94-217 (released Aug. 15, 1994); Fifth MO&O, 9 FCC Rcd at 4448-4449, ¶¶ 42-43. See also Oklahoma Tax Commission v. Chickasaw Nation, 63 U.S.L.W. 4594, 4596 (Supreme Court upheld applicability of a categorical immunity from certain State taxation to Indian tribes and their members and not to "non-Indians.")[3]

15. Having gotten so far in resolving so many complex issues in order to put its block C PCS auction back on track, consistent with both Congressional and Supreme Court imperatives, the Commission must now go the last step along the path thus far so wisely and judiciously chosen. The Commission must journey onward and eliminate the insupportable and unjust exception to its exception affecting the eligibility of Indian tribes like the Oneida Tribe. What is at issue is the effect the existence of a source of revenues has on the potential eligibility of Indian tribes to participate in the block C auction.

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[3] A restated version of comments submitted to the Commission on June 16, 1995 on the interpretation of Adarand in connection with the Oneida Tribe's participation in the entrepreneurs' block auction is attached hereto as Attachment A.

16. Under the rebuttable presumption affecting "gaming revenues," such revenues could disqualify and/or delay grant of licenses to Indian tribes. The Oneida Tribe is directly and adversely affected by this senseless and penal limitation, which is all the more egregious because of the following considerations.

17. The basis for penalizing gaming revenues finds no substantive support in the record before the Commission. To the contrary, there is record support for the opposite proposition in the Commission's Order on Reconsideration, FCC 94-217 (released Aug. 15, 1994, 75 RR 2d 1208 (herein "Reconsideration").

18. The exclusion is based on a mistake of law and is inconsistent with the law on how federal agencies must proceed when they choose to apply the criteria and standards of the Small Business Administration ("SBA").

19. The exclusion of gaming revenues defies economic rationale or analysis, particularly given the presence of much larger A and B block competitors who will have a headstart in the marketplace despite the best efforts of the Commission to minimize that advantage or to compensate for it by the presumed lowering of bidding values for block C market areas.

20. The application of such an exclusion of revenues is discriminatory vis-a-vis numerous other entities - small business consortia, other Indian tribes with equal or greater sources of revenues derived from non-gaming sources, cash rich minority/female enterprises funded independently or via large non-attributable investors, and A and B licensees which are able to fund their PCS operations with the profits they derive and have derived from monopoly or near monopoly-based services.

21. The exclusion, even with the rebuttable presumption, clearly contradicts the expressed purposes of the Commission's administration of its auctions rules, introduces the demon of delay to the prompt roll out of competitive PCS service to the public, and will unfairly penalize and disadvantage a unique segment of Americans, whose unfortunate and unwarranted economic circumstances constitute one of the most intractable economic problems for a people in this country. Unless the exclusion is erased, the Oneida Tribe and potentially other Indian tribes will be denied their rights to full and fair participation in the block C auction, contrary to the expressed will of Congress and the announced commitments of the Commission itself.

NO RECORD SUPPORT FOR EXCLUSION OF GAMING REVENUES

22. The Commission adopted its exception from its affiliation rules for Indian tribes in its Order on Reconsideration, supra. The Commission's determination of the justification for the exception was made on its own motion (Reconsideration @ ¶ 1) and is clear and compelling.

> As recognized by Federal law and the Small Business Administration ("SBA") in its rules, these entities [Indian tribes or Alaskan Regional or Village Corporations] **are inherently disadvantaged.** We believe that these minority groups should be eligible to bid in the entrepreneurs' blocks ... despite their affiliation with entities owned by tribes ... which may have revenues or assets that exceed the general limits for eligibility in the entrepreneurs' blocks. (Id.)

23. Acknowledging that it borrowed from "the rules that are used by SBA to make size determinations" (Id. @ ¶ 3) in developing the FCC's affiliation rules, the Commission acknowledged that it "failed, however, to adopt an exemption in the SBA's rules that excluded from affiliation coverage entities owned or controlled by Indian tribes ..." and noted that -

> SBA is required by statute generally to determine size of a small business concern owned by an Indian tribe (or wholly owned business entity of such tribe) "without regard to its affiliation with the tribe, any entity of tribal government, or any other business enterprise owned by the tribe." (Id. @ ¶ 4)

24. The Commission next concluded that "adoption of an affiliation exemption for Indian tribes ... for purposes of eligibility in the entrepreneurs blocks is consistent with these ... Federal policies and complies with the Congressional mandate in the auction law." (Id. @ ¶ 5, Footnotes omitted). The Commission stated that it wished to make sure that Indian tribes and Alaska Native Corporations that Congress determined to be economically disadvantaged "have the opportunity to participate in spectrum-based services ..." (Id. @ ¶ 6).

25. The Commission also recognized the unique relationship between Indian tribes and the federal government in general -

> Moreover, in the promotion of Native American "self-determination," the Federal government has a "unique and continuing relationship with, and responsibility to, individual Indian tribes and to the Indian people as a whole."[14]
>
> Finally, without the exemption ... the Commission would not be able to ensure that all [Indian tribes] are provided meaningful opportunities to participate in broadband PCS spectrum auctions. (Id.)

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[14] 25 USC §450(a) (Congressional declaration of policy, Indian Self-Determination and Education Assistance Act). See also Morton v. Mancari, 417 US 536, 555 (1974).

26. There is no question that Federal law and policy and Congress and the FCC, as well as the courts, recognize that Indian tribes possess a unique status in this Nation and that their qualification to participate in the spectrum auctions for PCS block C is unlike any others. The clear recognition of this fact and law in the Reconsideration fully supports the tentative conclusions reached in the FNPRM about the application of the Indian Commerce Clause of the U.S. Constitution cited by the Commission in its FNPRM (¶ 20).

27. The recognition of the unique status of Indian tribes in the Reconsideration also has a direct bearing on the current issue of the "gaming revenues." The Commission expressly found

that the affiliation exception it was adopting was not related to the caps on either gross revenues or total assets.

> We note that Section 7(j)(10)(J) of the Small Business Act gives the SBA the discretion to consider tribal and other affiliations if it determines that one or more such tribally owned businesses have obtained, or are likely to obtain, a substantial unfair competitive advantage within an industry category. **We do not believe it necessary to make such a determination for broadband PCS auctions. The limited potential number of broadband PCS applicants that may benefit from this affiliation exemption will not present any unfair advantage to other eligible applicants that have gross revenues up to $125 million and assets of up to $500 million. ... Thus, such entities will not have any unfair advantage over other minorities in the entrepreneurs' block.** (Id. @ ¶ 7, Emphasis added, footnotes omitted.)

27. Thus, in the Reconsideration, the FCC made specific findings of fact that there would be no unfair competitive advantage that could or that would arise, as a result of the affiliation exception for Indian tribes, because the financial caps were so high and the entities subject to the exception so small that no issue was presented. Nothing further appears in the record of the Commission's proceedings on PCS until the adoption of the rebuttable presumption on gaming revenues in the Fifth Memorandum Opinion and Order, FCC 94-285 (released Nov. 24, 1994) (herein "Fifth MO&O").

28. In the Fifth MO&O, the discussion preceding the adoption of the rebuttable presumption on gaming revenues focused on the filings of minority representatives who expressed concern about special treatment for particular minority groups, namely, Native Americans (Fifth MO&O @ ¶ 43). In rebuttal to this attack, one Alaskan Native Corporation, Cook Inlet, countered that the affiliation exception for Indian tribes was justified because of the "number of constraints - both legal and cultural" that affected Indian tribes' ability to manage and dispose of their property. These constraints were cited by the Commission as interdicting important means

of raising capital "enjoyed by virtually every other corporation" other than Native corporations. (Id.)

30. The Commission, therefore, stated it had been persuaded that such legal constraints, as existed on the uses of revenues produced by Indian tribes and Native American Corporations, placed "Indian tribes at a disadvantage vis-a-vis other minority groups with similar revenues and assets." (Id.) Then, in what will be shown to be reliance on a self-justifying generalization, a reference to an apparently "phantom" filing, and an actual misstatement of legislative history, the Commission ruled -

> After considering the record, however, we have determined that gaming revenues are not subject to the same types of legal restrictions as other revenues received by Indian tribes.[103] Therefore, we establish a rebuttable presumption that revenues derived from gaming pursuant to the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 et seq., will be included in our calculations when determining whether an applicant that is affiliated with an Indian tribe qualifies for the entrepreneurs' block or as a small business. **Cook Inlet has set forth several reasons why we should treat gaming revenues differently from other types of Indian tribe revenues. First, these revenues were not part of the tribal economic picture when Congress enacted the SBA tribal exception to the affiliation rule in 1970.[104] Second, the Indian Gaming Regulatory Act provides certain Indian tribes with a non-traditional source of revenue that could be very substantial.[105] Cook Inlet also asserts that gaming revenues are not subject to the same types of legal and governmental controls as other revenues received by Indian tribes, and therefore are more analogous to the revenues of non-Indian entities.[106] Furthermore, Congress granted the SBA (whose rules inspired our affiliation rules) flexibility to treat tribal and other affiliations with exceptional revenues differently if such revenues would create an "unfair competitive advantage."** (footnote omitted). Gaming revenues generated by tribal organizations, appear to be exceptional revenues that if not included, create an unfair competitive advantage in the auctioning of broadband PCS entrepreneurs' block licenses. Thus we will include such gaming revenues in our calculations when determining eligibility for the entrepreneurs' block and for small business status, unless the entrepreneurs' block applicant establishes that it will not receive an unfair competitive advantage,

because significant legal constraints restrict its ability (or an affiliate's ability) to access and utilize revenues from gaming. (Id. @ ¶ 44).

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103 Cook Inlet ex parte comments, filed Oct. 31, 1994, at 2.
104 Cook Inlet ex parte comments, filed Oct. 31, 1994, at 2.
105 Id.
106 Id.

31. The Commission's ruling cannot withstand legal analysis nor is it capable of being supported by the actual and available record. The only information about the nature of gaming revenues the Commission had before it were the comments of a single entity, Cook Inlet. Cook Inlet does not engage in gaming and has no gaming revenues, yet its revenues and assets are far greater than the Oneida Tribe's. Yet, nothing appears in the record that suggests that the Commission made any attempt to examine the basis for Cook Inlet's assertions about gaming revenues; nor to compare the substantial revenues Cook Inlet itself derives from its own non-gaming activities.

32. Further, Cook Inlet's contention that Congress enacted the tribal affiliation rules when gaming revenues were not part of the tribal economic picture is clearly erroneous. The tribal exception to the SBA's affiliation rules was passed in 1990 (not 1970), two years after the passage of the Indian Gaming Regulatory Act, which was passed to regulate gaming on Indian lands. This fact refutes the Commission's reliance on the assertions of Cook Inlet that Congress was not cognizant of gaming revenues when it passed the SBA tribal exemption. Finally, in attempting to prepare these comments, efforts were made to retrieve the Cook Inlet comments on which the Commission's reliance for most of its rationale expressed in the Fifth MO&O at ¶ 44 is based. No copy of Cook Inlet comments cited in footnotes 103 to 106 can be found by the

Commission staff or this firm.[4] In short, the OOneida TribeNation is faced with being penalized for its production of a certain type of revenues on the basis of assertions, patently self-serving, contained in a non-existent, misplaced or lost document.

33. Analysis of the Commission's legal basis provides an equally weak premise in support of the gaming revenue exclusion. First, as already stated, Congress was fully aware of the part gaming revenues played in the tribal economic picture when it passed the SBA affiliation rule.[5] Second, the standard of unfair competitive advantage must be **linked to an industry category**. The record contains no discussion nor analysis of how the existence of gaming revenues could impact the PCS **industry**.

34. Such an analysis is critical. But the record shows that such an analysis played no part in the gaming revenues determination of the Commission. Rather, what is shown is an attempt at subliminal avoidance of the potentially politically delicate issue of minority group opposition to the exception from the affiliation rules for Indian tribes in general (which is suggested by the references to the oppositions filed at ¶ 43 of the Fifth MO&O). Then what is shown, is a rationalization based on self-interested and legally inaccurate comments of one entity.

35. All the more puzzling, the record is devoid of: any definitions by which to gauge at what level of gaming revenues an "unfair competitive advantage in an industry category" might exist; how any amount of gaming revenues could give an Indian tribe a competitive advantage over such A and B block competitors as AT&T, MCI, Sprint, any of the RBOCs, etc., which

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[4] A Freedom of Information Request produced the response that no copy of these comments could be found. Moreover, when Cook Inlet was asked to provide a copy and expressed a seeming willingness to do so, it nevertheless failed to do so.

[5] ¶ 32, supra.

comprise the industry category in question; or any definition of "unfair competitive advantage" in general or as used by the SBA.[6]

36. The Commission's analysis in the Fifth MO&O is also legally deficient because it doesn't address and, therefore, does retract the findings it made in its Reconsideration. Those findings are that no competitive advantage is possible, given the limited scope of the exception (Indian tribes) and the size of the other entrepreneurs' block applicants. The "basis" in the Fifth MO&O for including gaming revenues has nothing to do with these findings and no analysis is provided which would support the about-face of the Commission from its Reconsideration.

OSTRACIZING GAMING REVENUES IS ARBITRARY AND CAPRICIOUS

37. Ostracizing a singular stream of revenues is arbitrary and capricious. The Commission has not proposed to rescind its exception to its affiliation rules applicable to small business consortia. Hence, 10 small businesses each with $15 million of gross revenues could create an applicant with $150 million in gross revenues in excess of the cap. Or a consortia could have 10 companies each with $100 million in gross revenues and each with an average of $400 million in total assets which combined would provide an applicant with a base of $1 billion in gross revenues and $4 billion in total assets. No disqualification would apply, but the Oneida

[6] The SBA has never defined the terms "unfair competitive advantage" or "unfair competitive advantage in an industry category." Even if there were such a definition, it would not automatically be applicable to the emergent PCS industry, populated as it is with competitors of starkly differing sizes, and financial and other resources. This lack of any precedential interpretation of the critical standard to be applied is not disclosed in any part of the Commission's record in this proceeding. It is, therefore, impossible to know what proofs are necessary to rebut the presumption necessary to avoid the penalty associated with having gaming revenues. This is hardly the type of considered rulemaking that can withstand judicial scrutiny or constitutional challenge.

Tribe, with a slight excess of gross revenues in one year before the filing from gaming revenues, would not be permitted to apply for the entrepreneurs' block licenses.

38. Similarly, other entities with equal or greater sources of revenues derived from non-gaming sources, would be allowed to participate, such as Cook Inlet which has over $600 million in total assets from oil, broadcast and other properties. Cash or asset-rich minority or female enterprises, funded independently or via large non-attributable investors, could and undoubtedly will field applicants of far larger resources than the Oneida Tribe with its gaming revenues. If the Oneida Tribe applies in one or more markets which has other applicants comprised of small business consortia with larger resources which are nonetheless not included under the affiliate exception, or larger minority or female entities with major financial backers, will such circumstances rebut the presumption of unfair competitive advantage?

39. Can the presumption be rebutted by showing the presence of large A and B licensees which are able to fund their PCS operations with the profits they derive, and have derived, from monopoly or near monopoly-based services? Why should entities, about which other would-be block C applicants already have expressed serious concern to the Commission, albeit for naught thus far,[7] be able to participate in the PCS "revolution" and obtain their licenses before their smaller competitors, but have had no restrictions placed on any revenues they used to bid in the A and B auctions?

CONCLUSION

40. In a roiling sea of contending and complicated constitutional, legal, regulatory and political goals, the Commission, for the most part, has commendably charted a sound and

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[7] See decisions cited in ¶ 9 and 12, supra.

judicious course. But it has run aground on the issue of gaming revenues because of the inaccuracy of certain information on which it relied, erroneous interpretations of legislative history with which it was supplied, and the failure to adhere to standard regulatory procedures in developing the record necessary to lawfully support its actions. In addition, in attempting to balance competing minority interests, it has overstepped its role and created an indefensibly discriminatory barrier to the entry of a group of people it unquestionably seeks to provide (and is obligated to provide) the opportunity to participate in the "wireless revolution."

The Commission should adopt the tentative conclusions it has reached designed to speedily reschedule the auction for block C licenses, confirm the unique status of Indian tribes based on the Indian Commerce Clause and established Federal policy as unchanged by the Adarand decision and revoke the rule requiring rebuttal of the presumption of unfair competitive advantage from the presence of gaming revenues.

Respectfully Submitted,

ONEIDA TRIBE OF INDIANS
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Dated: July 7, 1995

ATTACHMENT A

to

Comments of the Sovereign Nation of the Oneida Tribe of Indians of Wisconsin in Response to the Commission's Further Notice of Proposed Rule Making in PP Docket No. 93-253 and GN Docket Nos. 90-314 and 93-252

Re: Analysis of *Adarand Constructors, Inc. v. Pena*

This Attachment A is a restatement of the informal comments submitted June 16, 1995 by the Oneida Tribe, in response to the invitation of Chairman Hundt[1], and contains comments on the position of the Oneida Tribe, a prospective bidder in the entrepreneurs' block C of the PCS auctions, on the rules of the Commission in light of Adarand Constructors, Inc. v. Pena ("Adarand").

The Oneida Tribe submitted its informal comments out of concern for the effect of that decision on the meaningful participation of Native Americans in the entrepreneurs' blocks of the PCS auctions.

The Oneida Tribe is principally concerned with two potential effects of the Adarand decision on the participation of Native Americans in the PCS auctions, both of which are associated with special treatment of tribal business entities under the Commission's affiliation rules. The first such potential effect appears to have been eliminated by the tentative conclusion reached in the FNPRM that the Commission does not read Adarand to address the unique, non-

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[1] Speech to Minority Business Enterprise Legal Defense and Education Fund, Howard University, Washington, D.C., June 13, 1995.

racial, non-gender-based status of Indian tribes, insofar as the rules for attribution of the revenue of business affiliates of a bidding entity[2], are concerned.

The second potential effect, in light of Adarand, was that a substantial portion of the Native American population would lose their avenues of participation in the PCS revolution because of the required abandonment of the preferences afforded to minority-owned businesses, and the limitations on participation because of tribal gaming business. The first aspect of these concerns has been partially mooted, but the latter remains a major concern.

The Special Relationship of Indian Nations of the Federal Government Has Always Mandated Individualized Treatment of Nations in Constitutional Questions.

In his dissent in Adarand, Justice Stevens asserts that the Court should "reject a concept of 'consistency' that would view the special preferences that the National Government has provided to Native Americans since 1834 as comparable to the official discrimination against African Americans that was prevalent for much of our history." Id. at *25, referencing Morton v. Mancari, 417 U.S. 535 (1974). In Morton, the Court upheld a provision in the Indian Reorganization Act that gave preferences to Indian applicants for positions with the Bureau of Indian Affairs. Id. at 544. In holding that the employment preference provisions of the Act were not an equal protection violation, the Court relied on the unique relationship between Indian Nations and the Federal Government. In the Court's words:

> Resolution of the instant issue turns on the unique legal status of Indian Nations under federal law and upon the plenary power of Congress, based on a history of treaties and the assumption of a "guardian-ward" status, to legislate on behalf of federally recognized Indian Nations. The plenary power of Congress to deal with the special problems of Indians is drawn both explicitly and implicitly from the Constitution itself. Article I, § 8, cl. 3, provides Congress with the power to

[2] 47 C.F.R. §740.20(l)(11)(i).

> "regulate Commerce ... with the Indian Nations," and thus, to this extent, singles Indians out as a proper subject for separate legislation.

Id. at 551-552. As the Court recognized in Morton, the relationship between the Federal government and that of Indian tribes is one between sovereigns. In this respect, the Commission's tentative conclusion is absolutely correct that the status of Indian tribes is in no way racial or gender-based and, hence, not affected by Adarand. Id. at 554, n.24.

The Communications Act of 1934 is a general federal statute, not specifically written to apply to Indian tribes. Because federal power over Indian affairs is plenary, questions of the applicability of general federal legislation depend on the intention of Congress.

The treatment of Indian tribes in federal legislation has always been special and unique to that accorded other persons similarly situated. "Literally every piece of legislation dealing with Indian tribes and reservations ... single out for special treatment a constituency of tribal Indians living on or near reservations." Id. at 552. If Indian tribes are treated by the federal government the same as other minority-owned businesses, the "solemn commitment of the Government toward the Indians would be jeopardized." Id.

The Commission's Present Policies Will Exclude Many Native Americans.

Native Americans, as the Commission has recognized, encounter serious legal and cultural barriers to aggregation of investment capital in amounts necessary to acquire and exploit PCS licenses and technology.[3] Participation in a meaningful way for Native Americans requires that

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[3] See Fifth Memorandum Opinion & Order, In the Matter of Implementation of Section 309(j) of the Communications Act-- Competitive Bidding, Docket No. 93-253 (released November 23, 1994) ("Fifth MO&O") ¶¶43 and 44, and Order on Reconsideration, In the Matter of Implementation of Section 309(j) of the Communications Act-- Competitive Bidding, Docket No. 93-253 (released August 15, 1994) ("Order on Reconsideration").

they be able to avail themselves of the bidding and development preferences that were available to them because of their minority status. The loss of those preferences, that is possible under Adarand, makes participation at the tribal business level the only method of access for Native Americans. Indian tribes have great difficulties in raising investment capital in the traditional ways available to other business entities (e.g., sales of equity and debt securities, hypothecation of business revenues or mortgaging of real estate). Recognition of this fact has led Congress to provide Native Americans an alternative means of participating in Federal programs, by allowing business entities owned by Indian tribes and Alaska Native Corporations to apply for programs of the Small Business Administration (the "SBA"), without having the revenues of the other tribal businesses attributed to the bidding entity.[4]

Recognizing that "Indian tribes and Alaska Native Corporations are unique aggregations of very limited capital of historically disadvantaged people"[5] and that "in the promotion of Native American 'self determination.' the Federal government has a 'unique and continuing relationship with, and responsibility to, individual Indian tribes and to the Indian people as a whole,'"[6] the Commission had adopted the SBA's exemption, contained in 15 U.S.C. §636(j)(10)(J)(ii)(11).

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[4] 15 U.S.C. §636(j)(10)(J)(ii)(11) requires that:

> In determining the size of a small business concern owned by a socially and economically disadvantaged Indian tribe (or a wholly owned business entity of such tribe), each firm's size shall be independently determined without regard to its affiliation with the tribe, any entity of the tribal government, or any other business enterprise owned by the tribe, unless the Administrator determines that one or more such tribally owned business concerns have obtained, or are likely to obtain, a substantial competitive advantage within an industry category.

[5] Order on Reconsideration, ¶6.

[6] Order on Reconsideration, ¶6, citing 25 U.S.C. §450a(b) (Congressional declaration of policy, Indian Self-Determination and Education Assistance Act) and Morton, 417 U.S. at 555.

In doing so, the Commission noted its belief "that adoption of an affiliation exemption for Indian tribes and Alaska Native Corporations, for purposes of eligibility in the entrepreneurs' blocks, is consistent with these and other Federal policies and complies with the congressional mandate in the auction law."[7] The Commission also noted that "without the exemption we adopt herein, the Commission would not be able to ensure that all classes of designated entities are provided meaningful opportunities to participate in broadband PCS spectrum auctions."[8] The rules arising from Order on Reconsideration did not differentiate among sources of Indian revenue.

The problem, which has been exacerbated by the Adarand decision, came with the Commission's re-adjustment of the tribal affiliation rule in the Fifth MO&O, by which the Commission introduced a rebuttable presumption that revenues derived from gaming, pursuant to the Indian Gaming Regulatory Act, will be included in calculations when determining whether an applicant that is affiliated with an Indian tribe qualifies for the entrepreneurs' block or as a small business. As such, the Commission plans to include such gaming revenues in its calculations unless the entrepreneurs' block applicant establishes that it will not receive an unfair competitive advantage, because significant legal constraints restrict its ability (or an affiliate's ability) to access and utilize revenues from gaming. The current rules seem to have arisen from a mis-understanding on the part of the Commission as to the nature of §636(j)(10)(J)(ii)(11) and the character of gaming revenues vis-a-vis revenues from other business sources. The Commission, in establishing this regime, misapprehends the nature of the §636 exemption, which allows the attribution of Indian revenues only where the Administrator of the SBA determines

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[7] Order on Reconsideration, ¶5.

[8] Order on Reconsideration, ¶6.

that the tribally-owned business in question would otherwise obtain a substantial unfair competitive advantage within an industry category.[9] The legislative history for this section of the Small Business Act indicates that "[i]t is expected that this exception to the statutory rule will be applied only in the clearest case of unfair competitive advantage."[10] This standard clearly puts the burden of proof on the agency seeking to establish the existence of an unfair competitive advantage. The Commission's policy, which places on the applicant the burden of showing that an advantage does not exist, contravenes the legislative history. Moreover, because the statute requires analysis "within an industry category," the Commission cannot base its position on any one group of potential participants within that category That is, the Commission cannot lawfully make comparisons of advantage only as to minority/female applicants or small business applicants. It must make its comparison of advantage over the entire spectrum of wireless service providers, that is, all existing cellular and PCS A, B and C licensees/applicants. Any other basis of comparison would contravene the statute.[11] Moreover, the SBA itself applies a case-by-case analysis and has never created a presumption of unfair competitive advantage.

It appears from the Fifth MO&O that the Commission constructed the blanket presumption because it believes that gaming revenues are different from tribal revenues from other business sources. That belief is inaccurate, and seems to have stemmed from certain *ex parte* comments

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[9] See statutory language quoted in note 4, supra.

[10] Congressional Record- Senate, S. 17647, Section 204, Size Determinations Relating to Tribally Owned Business Concerns (emphasis added).

[11] See cases cited at ¶ 9 and 12 of the Comments.